McDonald Partners, Inc. d/b/a/ Rodgers & McDonald Graphics *and* Communications Workers of America, Local 14904, Southern California Typographical and Mailer Union, AFL–CIO–CLC.
Case 21–CA–32908

July 30, 2004

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND WALSH

On October 1, 2001, the National Labor Relations Board issued its Decision and Order in this case, in which it affirmed Administrative Law Judge Mary Miller Cracraft's finding that the Respondent violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from Communications Workers of America, Local 14904, Southern California Typographical and Mailer Union, AFL–CIO–CLC (the Union),[1] following the expiration of the parties' 1995–1998 collective-bargaining agreement, without a good-faith, reasonable uncertainty as to the Union's continued majority status.[2]

Thereafter, the Respondent filed a petition for review of the Board's Order with the United States Court of Appeals for the District of Columbia Circuit. On June 20, 2003, the court granted the Respondent's petition and remanded the case to the Board, finding that the Board improperly refused to consider some of the Respondent's evidence submitted in support of its claim of a good-faith reasonable doubt of the Union's majority support.[3]

The court concluded that the Board improperly disregarded evidence of employee dissatisfaction with the Union arising before the execution of the parties' 1995–1998 contract. In brief, this evidence, which is fully described in the judge's decision, 336 NLRB at 841–842, includes statements made by two union stewards, Cynthia Termath and Ignacio Burgos, to the Respondent's owner, Doyle McDonald, reporting a lack of employee support for the Union. The court held that the Board had misinterpreted the Supreme Court's decision in *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781 (1996), as precluding the Respondent from relying on such evidence to establish a good-faith doubt of the Union's majority status. The court determined that *Auciello Iron Works* only precludes an employer from relying on evidence predating the execution of a collective-bargaining agreement while the irrebuttable presumption of union majority status exists during the term of that agreement, up to three years. *McDonald Partners, Inc.*, 331 F.3d at 1005–1006. However, in the court's view, this irrebuttable presumption does not forever preclude an employer from relying on precontract evidence to show it had a good-faith, reasonable doubt. Instead, "[w]hen the three-year period passes or the contract expires, the presumption becomes rebuttable, and all evidence—again, regardless of when it arose—may potentially be relevant to the employer's good faith doubt." Id. at 1006.

The court also concluded that the Board erroneously refused to consider evidence of declines in union membership and dues-checkoff authorizations during the term of the contract. This evidence includes the following: (a) statements by Respondent's managers to McDonald indicating that employees were no longer interested in the Union and that no employee remained a member in good standing with the Union after July 1995; (b) Termath's 1995 statements to McDonald reporting that she had resigned from the Union because she was dissatisfied with its representation, that most employees were dissatisfied with the Union, and that none of the employees belonged to the Union; (c) the failure of any employee to submit a dues-checkoff authorization to the Respondent following execution of the 1995–1998 contract; and (d) the Allied Printing Trades Association's 1996 termination of the Respondent's right to use the union association label (a graphic called a "union bug") on its products because the Respondent did not employ any members in good standing with the Union.

The Board adopted the judge's refusal to consider the evidence of a decline in dues authorization checkoffs and the loss of the union bug based on the Board's traditional disregard of such evidence as grounds for good-faith, reasonable doubt. The court rejected the Board's ration-

[1] The Union merged with Southern California Typographical and Mailer Union Local 17, affiliated with Local 14917 of Communications Workers of America, AFL–CIO–CLC, on January 1, 1997. The parties agree that the Union, as successor to Local 14917, took over representation of the employees in Respondent's bargaining unit pursuant to the merger.

[2] *Rodgers & McDonald Graphics*, 336 NLRB 836 (2001). In *Levitz Furniture Co. of the Pacific*, 333 NLRB 717 (2001), the Board overruled *Celanese Corp.*, 95 NLRB 664 (1951), insofar as it permitted an employer to withdraw recognition from an incumbent union on the basis of a good-faith doubt of the union's continued majority status. The Board held that an employer may unilaterally withdraw recognition only where the union has actually lost majority support. Id. at 717. However, the Board held that its analysis would only be applied prospectively. Thus, in the present case, the Board applied the "good-faith uncertainty" standard as elucidated by the Supreme Court in *Allentown Mack Sales & Service v. NLRB*, 522 U.S. 359 (1998).

In view of the fact that *Levitz* is not applicable to the instant case, Chairman Battista and Member Schaumber express no view as to whether that case was correctly decided.

[3] *McDonald Partners, Inc. v. NLRB*, 331 F.3d 1002 (D.C. Cir. 2003).

ale in this regard. The court acknowledged that "a union may enjoy majority support even if less than a majority of employees maintain union membership or authorize their employer to deduct union dues from their paychecks." Id. However, the court reasoned that while union membership and dues checkoff data "might not conclusively demonstrate a lack of majority support," id., they may suggest an erosion of support and therefore be probative of an employer's good-faith, reasonable doubt, id. at 1007.

The court also rejected the Board's alternative holding that the union membership and dues checkoff evidence could not be considered because of its staleness. Specifically, the court found that the dues checkoff evidence was current and continuing given that "[e]ach day without any dues authorizations constituted new evidence of lack of employee support for the union." Id. at 1007. As to the other evidence of lack of union membership, summarized above, the court found that it was not stale because, in its view, there had been no showing of changed circumstances or new evidence calling the reliability of the old evidence into doubt. Id. at 1008. Accordingly, the court concluded that a remand was necessary to allow the Board to consider all probative evidence as required by *Allentown Mack Sales & Service*, supra.

On September 3, 2003, the Board accepted the court's remand, and statements of position were filed by the Respondent, the Charging Party Union, and the General Counsel.[4] Having accepted the remand,[5] the Board must also accept the court's opinion as the law of the case. The Board must therefore abide by the court's direction to consider the aforementioned evidence that the court found to have been improperly disregarded by the Board. Upon consideration of this evidence, as well as the other evidence previously considered by the Board but found insufficient,[6] the Board finds that the Respondent satisfied its burden of proving that it had a good-faith, reasonable uncertainty as to the Union's majority status at the time it withdrew recognition from the Union in August 1998. Accordingly, we shall dismiss the complaint.

ORDER

The complaint is dismissed.

[4] The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[5] The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

[6] This evidence includes the resignation of the two Union stewards after execution of the 1995–1998 contract, and the failure of the Union to hold meetings with members, to process grievances during the last year of the 1995–1998 contract, and to involve employees in contract negotiations in 1998.

Dated, Washington, D.C. July 30, 2004

Robert J. Battista, Chairman

Peter C. Schaumber, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Stephanie Cahn, Esq., for the General Counsel.
Harry R. Stang, Esq.(Bryan Cave, LLP), of Santa Monica, California, for the Respondent.

DECISION

STATEMENT OF THE CASE

MARY MILLER CRACRAFT, Administrative Law Judge. This case was tried in Los Angeles, California, on June 29, 1999. The charge was filed by Communications Workers of America, Local 14904, Southern California Typographical and Mailer Union, AFL–CIO–CLC (the Union) against McDonald Partners, Inc. d/b/a Rodgers & McDonald Graphics (Respondent) on August 13, 1998, and the complaint was issued January 26, 1999.[1] At issue is whether Respondent's withdrawal of recognition from the Union in August 1998[2] violated Section 8(a)(1) and (5) of the Act.

The parties were afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, and to argue the merits of their respective positions. On the entire record,[3] including my observation of the demeanor of the witnesses,[4] and after considering the briefs filed by counsel for the General Counsel and counsel for the Respondents, I make the following

[1] The consolidated amended complaint issued January 26, 1999. It combined this case with Case 20–CA–32592 for purposes of hearing. I granted a motion to sever Case 20–CA–32592 from the instant case because Case 20–CA–32592 was settled prior to hearing. The complaint paragraph relevant to Case 20–CA–32592 was deleted from the consolidated amended complaint.

[2] All dates are in 1998 unless otherwise indicated.

[3] Respondent's unopposed motion to correct the transcript is granted. Counsel for the General Counsel moved to strike portions of Respondent's posthearing brief. Specifically, counsel moved to strike Respondent's arguments regarding the investigative stage of these proceedings because no evidence in the record supports the factual assertions made by Respondent. General Counsel's motion to strike those portions of Respondent's brief dealing with the investigative stage of this case is granted.

[4] Very few facts are in dispute. However, to the extent necessary, credibility resolutions have been made based upon a review of the entire record and all exhibits in this proceeding. Witness demeanor and inherent probability of the testimony have been utilized to assess credibility. Testimony contrary to my findings has been discredited on some occasions because it was in conflict with credited testimony or documents or because it was inherently incredible and unworthy of belief.

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION STATUS

Respondent, a state of California corporation, maintains its commercial printing business in Carson, California. During calendar year 1997, its business operations involved the purchase and receipt of goods valued in excess of $50,000 directly from points outside the State of California. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Overview

Respondent and the Union's predecessor were parties to a series of collective-bargaining agreements, the most recent of which was effective from June 1, 1995, through May 31, 1998. In a memorandum of agreement executed by the Respondent on January 5, 1998, Respondent recognized the Union as the exclusive collective-bargaining representative of unit employees covered by the 1995–1998 contract including pressroom, shipping and receiving, bindery, mail room, pre-press, machinist, and building maintenance employees.

Following expiration of the 1995–1998 contract, the Union requested that Respondent bargain with it for a new contract. One bargaining session was completed. Thereafter, Respondent refused to continue bargaining and on August 5, 1998,[5] Respondent withdrew recognition of the Union as the exclusive bargaining representative of unit employees.

Facts

The merger between the Union and Southern California Typographical and Mailer Union Local 17, affiliated with Local 14917 of Communications Workers of America, AFL–CIO–CLC (Local 14917) was effective January 1, 1997. The parties agree that the Union, as successor to Local 14917, took over representation of the employees in Respondent's bargaining unit pursuant to the merger.

The Union and Respondent executed a Memorandum of Agreement on December 8, 1997, and January 5, 1998,[6] respectively, acknowledging that they were parties to the 1995–1998 contract between Respondent and Local 14917 and setting forth percentage merit increases, effective December 7, 1997.

Following expiration of the 1995–1998 agreement, Respondent and the Union commenced bargaining for a new agreement on June 3, 1998. Proposals were exchanged at this session. The second session was scheduled for July 23, 1998. However, upon his arrival, Howard Dudley, president of the Union, was informed that pursuant to discussions between counsel for Respondent and counsel for the Union, there would be no bargaining that day. Counsel for Respondent informed Dudley that Respondent had not yet made a decision regarding whether it would continue bargaining.

Nevertheless, Dudley sent a letter to Respondent dated August 1, 1998, in which he requested that the parties continue bargaining, proposing dates for further negotiations. By letter of August 5, 1998, Respondent opined that the Union did not represent a majority of its bargaining unit employees. The letter recited that the Union had rejected a stipulated representation election to resolve the issue. Further, the letter set forth the "facts and circumstances" which Respondent relied upon and requested that the Union respond stating whether the statements were accurate or were subject to explanation. Rather than respond to the August 5 letter, the Union filed the instant charge.

The specific "facts and circumstances" relied on in the letter may be summarized as follows:

1. The Union was never certified as the bargaining representative of Respondent's employees.
2. The vote to merge between the Union and Local 14917 was conducted even though many of Respondent's bargaining unit employees expressed opposition to the conduct of, and representation by, officers of Local 14917.
3. Only members of the two locals involved in the merger were allowed to vote.
4. None of the bargaining unit employees had any contact with or knowledge of Dudley or any other Union officials prior to the merger.
5. None of the bargaining unit employees were given notice of the merger, an opportunity to discuss it, or a chance to vote.
6. There have been virtually no communications between bargaining unit employees and the Union. The overwhelming majority, if not all, of the employees are unaware of the activities of the Union, the identity of its officials, or the fact that the Union determined, without consulting any bargaining unit employees, to allow automatic renewal of the 1995–1998 contract.
7. At the only negotiation session, it was apparent to the Respondent that the Union had not consulted with any bargaining unit employees regarding negotiation positions, no employees were involved in bargaining, and the Union refused to tell Respondent how many of its employees were members of the Union.
8. The Union did not contradict the Respondent's assertion that no employees had executed dues check-off authorizations or were paying dues to the Union.
9. No Union meetings have been held for many months. Although some employees received notice of a Union

[5] Respondent concedes that it withdrew recognition from the Union. However, it avers that the actual date of withdrawal was August 15 rather than August 5, 1998. On August 5, 1998, Respondent set forth its bases for withdrawal of recognition. Respondent afforded the Union an opportunity to present evidence, within 10 days, contrary to its evidence. Accordingly, Respondent argues that it withdrew recognition on August 15, 1998, when the Union failed to respond. I reject Respondent's argument regarding the date. The Union had no burden to prove its majority status or rebut Respondent's assertions regarding its doubt of the Union's majority status. It may rely instead on a presumption of majority status which attaches following contract expiration. See, e.g., *Pennsylvania State Education Assn.-NEA v. NLRB,* 79 F.3d 139, 144 (D.C. Cir. 1996).

[6] Although Respondent's signature is dated January 5, 1997, the parties agree that the correct date is January 5, 1998.

meeting on July 22, 1998, it does not appear that any attended the meeting.

10. The Union has not filed or processed any grievances on behalf of bargaining unit employees.

The letter concluded:

> In summary, the objective facts available to [Respondent] are that [the Union] never gave [Respondent's] employees the chance to vote on an affiliation, never informed them of the referendum, never informed them about the status of negotiations, and has effectively excluded them from the bargaining process and grievance adjustments. Moreover, it appears that no [Respondent] employee is a member in good standing of the CWA or [the Union], or has been, for some time.
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> While [Respondent] is fully prepared to meet its obligations under the National Labor Relations Act, it is not prepared, absent a credible and timely showing that the above facts and circumstances are not correct, to perpetuate a situation in which its employees' affairs are being determined by a purported labor organization which is essentially unknown to them and has effectively excluded them from any participatory involvement in the selection of its representatives, in collective bargaining, in grievance adjustments or in other decisions fundamental to their welfare.

As mentioned, the Union did not respond to this letter. There is no dispute that Respondent's employees who were members of the Union would have had an opportunity to vote in the affiliation election. Members of the Union and Local 14917 received ballots by mail. There is additionally no dispute that the Union did not take any action to terminate the 1995–1998 contract. Moreover, there is no dispute that the Union did not bring any bargaining unit employees to the table with it when the parties negotiated in June 1998. Finally, there is no dispute that Respondent lost its right to use the union bug in March 1996. Use of the union bug is premised on employment of members in good standing in the Union.

Cynthia Termath, mail manager,[7] acted as chapel chairperson (steward) and participated in bargaining on behalf of Local 14917 until 1995. Termath recalled speaking with Doyle McDonald, Respondent's owner, on two occasions during the period November 1994 to June 1995, when there was no collective-bargaining agreement in existence. Termath told McDonald that based upon her conversations with bargaining unit employees, she had concluded that employees had lost confidence in Local 14917. She explained that employees did not believe that Local 14917 was representing them and they were very upset. Two or 3 weeks later, she spoke with McDonald again. She told him that most of the employees did not want Local 14917 at that time and they were very displeased.

In addition, Ignacio Burgos, chapel chair for the Union since 1982, spoke with McDonald during this same period. Burgos told McDonald that the employees were really dissatisfied with the Union. "They didn't want to go back into the union.[8] They felt that the union wasn't visible enough for them. Didn't feel like there was anything tangible with the union because they didn't see any representatives from the union that often."

Nevertheless, a contract for the period 1995–1998 was negotiated. Termath was on the Local 14917 bargaining committee. Local 14917 agreed to Respondent's proposal deleting union security from the contract. After the 1995–1998 contract was negotiated, Termath resigned from Local 14917 because she was dissatisfied with its performance. In addition, in 1996, Respondent lost its ability to use the union bug. Burgos recalled that he resigned when this occurred.

Termath spoke with McDonald shortly after she resigned from Local 14917. She told him that she had resigned because she was dissatisfied with the service she had received and, "I figured I could, you know, get along without them just as well." Termath also told McDonald that, "the other employees were perfectly happy with pulling out of [Local 14917] and, you know, exercising their right as a—to not belong to the union any more." At some point during the first 2 months following execution of the 1995–1998 contract, Termath told McDonald that none of the bargaining unit employees were members of Local 14917. She also told him that employees had stopped dues check off. In yet another conversation, Termath told McDonald that a majority of the employees were dissatisfied with representation by Local 14917.[9]

Termath was unaware of the merger between Local 14917 and the Union until long after the merger vote.[10] During the last year of the 1995–1998 contract, neither Termath nor Burgos was aware of any grievances being processed by the Union on behalf of employees. Termath was not aware of any employees being asked to assist in negotiations in 1998. However, she did recall receiving a questionnaire from the Union regarding the upcoming negotiations. She completed the questionnaire and returned it to the Union. Termath was not aware that the Union had not given notice to terminate or modify the 1995–1998 contract.

[7] Termath's title indicates that she manages the mail. The parties agree that she is not a supervisor.

[8] On cross-examination, Burgos phrased his words to McDonald: "That the workers really didn't want the union. They were dissatisfied with the union that they felt that the union really didn't represent them."

[9] During direct examination, Termath testified that she told McDonald that none of the employees wanted the Union and none of them were having dues-checked off any more. Termath stated that she had spoken to about 60 of the approximately 100 unit employees prior to making this report to McDonald. On cross-examination, Termath was asked, "you testified about a conversation you had with Mr. McDonald when you told him that you had spoken to 60 people or approximately 60 people?" Termath responded affirmatively and was thereafter questioned about the employees with whom she spoke. Thereafter, Termath referred to telling McDonald that, "after talking to a lot of the employees, a majority of the employees, they were dissatisfied with representation by the union." Based upon these exchanges, I find that Termath told McDonald that she had spoken to a majority of the employees and that they were dissatisfied with representation by the union.

[10] Burgos could not recall whether he received notice of the merger. He did not remember notice of any meetings to discuss a merger. He did not receive a ballot to vote on the merger.

McDonald recalled that during the period from November 1994 to July 1995, his managers reported to him that employees were no longer interested in Local 14917. Based upon walking through the plant two or three times a day, he concluded that, "there was a real lack of kindness towards the union."

McDonald also recalled a series of meetings with Termath during this same period of time. During these meetings, she told him that employees, "didn't understand the union and why we had one, what the purpose was, the usefulness of the union." On another occasion when McDonald spoke with Termath, she asked him why the employees had a union. During this same period of time, another employee, Burgos, voiced concern about why Local 14917 was "there" during a meeting with McDonald.

Due to these and other concerns voiced by employees about Local 14917, Respondent negotiated an "open" contract (McDonald's term) for the 1995–1998 term. Pursuant to this contract, employees may join or not join the Union. Prior to the effective date of this contract, Respondent had discontinued checkoff of Union dues. Following the effective date, no employees submitted checkoff authorizations to Respondent. McDonald was informed by his managers at a subsequent meeting that none of the bargaining unit employees were members in good standing of the Union after July 1995.

By letter of March 4, 1996, Respondent was informed by the Union that it would lose its use of the label of International Allied Printing Trades Association (the union bug). McDonald thereafter attended a meeting to discuss this matter. He protested that he had a Union contract and did not believe that the Union could withdraw use of the union bug. Dudley responded that Respondent had no dues paying employees and, accordingly, could not continue to utilize the union bug.

Following his notification of the merger between Local 14917 and the Union, McDonald discovered that none of the unit employees had been informed of the merger prior to the merger vote. No grievances were filed pursuant to the 1995–1998 contract from June 1, 1997 to May 31, 1998.

Respondent terminated the 1995–1998 contract pursuant to the terms of the contract after noticing that the Union had not sent a notice of termination. The first negotiation meeting, held on June 3, 1998, was not attended by any unit employees. As far as McDonald knew, no unit employees were involved in bargaining or in developing negotiation goals or strategy. He asked Termath if she needed the day of negotiations off and was surprised to find that Termath was unaware that negotiations would commence that date. This was also true of Burgos. McDonald asked him if he would be involved in negotiations and Burgos told him that he was unaware of negotiations.

On July 22, McDonald noticed that the Union placed announcements of a meeting on the windshields of the cars in Respondent's parking lot. The meeting was to be held in the parking lot after work. Although McDonald did not watch the parking lot the entire time, he did not see any employees attend the meeting. Thereafter, Respondent withdrew recognition.

Legal Framework

During the term of a collective-bargaining agreement, a union enjoys an irrebutable presumption of continuing majority status.[11] Following expiration of a collective-bargaining agreement, the presumption of majority status is rebuttable.[12] Generally, in order to rebut the presumption of continuing majority status, post-expiration withdrawal of recognition may be based upon either an affirmative showing that the union lacked majority status at the time of withdrawal or on a reasonably grounded good faith doubt of the union's continued majority status based on objective considerations and in an atmosphere free of employer unfair labor practices.[13] In this case, Respondent relied upon its "good faith doubt" rather than an affirmative showing of lack of majority. Respondent bears the burden of proof to show by a preponderance of the evidence that it had a good faith basis for doubting the union's majority status at the point it ceased negotiating with the union.[14]

In *Allentown Mack Sales & Service, v. NLRB,* 522 U.S. 359 (1998), the Court upheld use of the identical good faith doubt standard for both polling and withdrawal of recognition. In doing so, the Court characterized a good faith doubt as, "a genuine, reasonable uncertainty about whether [the union] enjoyed the continuing support of a majority of unit employees."[15] In addition, the Court stated that employee statements of dissatisfaction with the quality of union representation are relevant to determining the existence of a good faith doubt. The Court held that evidence of a good faith doubt might be provided by "probative, circumstantial evidence," that is, not only evidence of express, first-hand disavowals but also reliable second-hand evidence of lack of support.[16]. The Court explained,

> Unsubstantiated assertions that other employees do not support the union certainly do not establish the fact of that disfavor with the degree of reliability ordinarily demanded in legal proceedings. But under the Board's enunciated test for polling, it is not the fact of disfavor that is at issue (the poll itself is meant to establish that), but rather the existence of a reason-

[11] *Fall River Dyeing & Finishing Corp. v. NLRB,* 482 U.S. 27, 37 (1987); *NLRB v. Burns International Detective Agency*, 406 U.S. 272, 290 fn. 12 (1972); *El Torito-La Fiesta Restaurants v. NLRB,* 929 F.2d 490 (9th Cir. 1991).

[12] *NLRB v. Curtin Matheson Scientific*, 494 U.S. 775, 778 (1990).

[13] Id.

[14] *Pennsylvania State Education Assn.-NEA v. NLRB,* 79 F.3d 139, 148 (D.C.Cir 1996). Prior to the hearing in this case, Respondent subpoenaed union records regarding employee membership in the Union, grievances processed by the Union, and employee participation in the Union. I granted the Union's motion to quash the subpoena because the Union's records did not relate to any matter at issue. An employer must be aware of the objective facts on which it bases withdrawal of recognition at the time it withdraws recognition. *Orion Corp.*, 210 NLRB 633, 634, enfd, 515 F.2d 81 (7th Cir. 1975). Accordingly, after acquired subpoenaed evidence is totally irrelevant for purposes of showing that Respondent had a reasonably based good faith doubt of lack of majority status.

[15] *Allentown Mack*, supra, 118 S.Ct. at 823. See also, *Henry Bierce Co.*, 328 NLRB 646, 650–651 (1999).

[16] For example, in *Allentown Mack*, supra, the Court noted that evidence from a union steward that "if a vote was taken, the Union would lose" and "it was his feeling that the employees did not want a union," was worthy of substantial probative value on the issue of reasonable doubt.

> able uncertainty on the part of the employer regarding that fact.
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> . . . .
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> Of course the Board is entitled to be skeptical about the employer's claimed reliance on second-hand reports when the reporter has little basis for knowledge, or has some incentive to mislead. But that is a matter of logic and sound inference from all the circumstances, not an arbitrary rule of disregard to be extracted from prior Board decisions.

Arguments

Counsel for the General Counsel notes that Respondent bargained with the Union following expiration of the 1995–1998 contract. After the first bargaining session on July 23, 1998, a second session was scheduled for August. However, Respondent withdrew recognition before a second session could be held. Counsel for the General Counsel argues that Respondent's evidence of its good faith doubt was based upon information it obtained in 1995, prior to execution of the 1995–1998 contract. Counsel asserts that Respondent was precluded from relying upon this evidence once it executed the 1995–1998 contract. Moreover, this information, counsel asserts, was stale and unreliable evidence and did not demonstrate a lack of majority support for the Union.

Respondent asserts that the facts it relied upon to withdraw recognition demonstrate not only its good faith doubt, but also the Union's complete lack of support among unit employees. Noting that the chief shop stewards and several unit employees informed Respondent that they no longer supported the Union, that the employees did not want to be represented by the Union, and the employees no longer belonged to the Union, Respondent asserts that it possessed a well-founded good faith doubt of majority support at the time it withdrew recognition. Respondent asserts that there is absolutely no evidence that employee or chief shop stewards' reports were unreasonable or unreliable. Finally, Respondent contends that the General Counsel failed to produce any evidence of membership in the Union, dues checkoff authorizations, records of meetings with bargaining unit employees, grievances, records reflecting the appointment of stewards or bargaining committee members, or records of proposed meetings. Respondent does not view its evidence as "stale." Rather, Respondent perceives the evidence on a continuum from 1994 and 1995 assertions from employees and chief shop stewards of lack of majority status to the more recent inactivity of the Union.

Analysis

In agreement with counsel for the General Counsel, I find that Respondent may not rely upon evidence which predates its execution of the 1995–1998 contract. In *Auciello Iron Works v. NLRB,* 517 U.S. 781 (1996), relied upon by counsel for the General Counsel, the Court held that an employer may not enter into a collective-bargaining agreement and thereafter assert a good faith doubt of the union's majority status based on facts the employer knew prior to agreeing to the contract. In essence, such facts become moot if the employer chooses to bargain to agreement with the union. The employer thus reaps the economic benefit of bargaining to agreement without raising the issue.[17] Therefore, it follows that throughout the term of the contract and after its expiration, the employer has foregone reliance upon any evidence in support of its good faith doubt which predates execution of the contract.

Moreover, Respondent's reliance on lack of certification of Local 14917[18] is unavailing. A union is entitled to an irrebutable presumption of majority status during the first year following certification[19] while it is entitled to an irrebutable presumption of majority status for a reasonable period of time following voluntary recognition.[20] In the current circumstances, Respondent and the Union or the Union's predecessor have had a bargaining relationship for at least 6 years. Accordingly, the presumption of majority status at issue herein flows not from certification or voluntary recognition but rather from the collective-bargaining relationship including execution of and adherence to collective-bargaining agreements. Accordingly, I reject this factor as a basis for support of a good faith doubt of majority status.

Respondent also based its withdrawal of recognition on the mechanics of the merger vote between Local 14917 and the Union and failure of either Local 14917 or the Union to give notice to its employees of the merger vote.[21] Nevertheless, Respondent concedes that the merger satisfied the due process standard set forth in *NLRB v. Financial Institution Employees Local 1182 (Seattle-First National Bank),* 475 U.S. 192 (1986). Moreover, as to the substantial identity issue, Respondent recognized the Union as the legitimate successor to Local 14917. Accordingly, the fact that some of Respondent's employees[22] were not involved in the merger, not to mention that the merger was effective January 1, 1997, is of little significance in determining whether Respondent had a good faith doubt of the Union's majority status. Moreover, a union affiliation change has been held an inadequate basis for withdrawal of recognition.[23]

Similarly, inactivity of the Union,[24] failure to involve employees in bargaining,[25] and failure to process grievances,[26] even if true, are not factors which alone support a good faith doubt warranting withdrawal of recognition. Inactivity of a union (short of defunctness) or failure to process grievances is

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[17] "Here, for example, if Auciello had acted before the Union's telegram [of acceptance] by withdrawing its offer and declining further negotiation based on [its reasonable good faith] doubt (or petitioning for decertification), flames would have been fanned, and if it ultimately had been obliged to bargain further, a favorable agreement would have been more difficult to obtain." Id. 475 U.S. at 789–790.

[18] Facts and circumstances #1.

[19] *Brooks v. NLRB,* 348 U.S. 96 (1954).

[20] *Keller Plastics Eastern,* 157 NLRB 583, 587 (1966).

[21] Facts and circumstances ##2–5.

[22] There is no evidence that Respondent knew whether each and every one of its unit employees was ignorant of the merger vote.

[23] *NLRB v. Financial Institution Employees Local 1182 (Seattle-First National Bank),* 475 U.S. 192 (1986).

[24] Facts and circumstances ##6 and 9.

[25] Facts and circumstances #7.

[26] Facts and circumstances #10.

ordinarily an insufficient basis upon which to rebut the presumption of continuing majority status.[27]

Finally, former chapel chairperson Termath testified that shortly after execution of the 1995–1998 contract, she told Respondent that she had resigned from the Union because she was dissatisfied with the service she had received and had determined that she could get along without the Union just as well. Termath also told McDonald that, "the other employees were perfectly happy with pulling out of [Local 14917] and, you know, exercising their right as a—to not belong to the union any more." At some point during the first 2 months following execution of the 1995–1998 contract, Termath told McDonald that none of the bargaining unit employees were members of Local 14917. She also told him that employees had stopped dues check off. In yet another conversation, Termath told McDonald that a majority of the employees were dissatisfied with representation by Local 14917.

This evidence, alone, is an insufficient basis to support a good faith doubt of majority status. The former steward for the predecessor union reported first hand information that she had withdrawn from the Union because she was dissatisfied with the Union. She additionally reported the following second hand information: (1) other employees were happy to "pull out" of the Union and "not belong" to the union; (2) none of the bargaining unit employees belonged to the Union and many had stopped dues check off; (3) a majority of employees were dissatisfied with the Union's representation of them. Interestingly, McDonald did not corroborate Termath's testimony.[28] Undeniably, Termath's statements might contribute to a reasonable uncertainty regarding whether a majority of unit employees continued to support the Union. However, without more, these statements alone are insufficient.

In *Allentown Mack*, supra, the Court noted that the employer had reliable first-hand evidence that 7 of 32 unit employees did not support the union. An eighth employee reported that he did not feel he was being represented for the amount of union dues he was paying. The union steward also reported that if a vote were taken, the union would lose. Finally, another employee reported that the entire night shift did not want the union. The Court concluded that an employer could reasonably give great credence to the statements of second-hand opposition to the union, especially those of the steward. When combined with the first-hand opposition, the Court found that there was sufficient evidence to support a doubt or uncertainty of the union's continued majority support. In comparison, the quantum of evidence herein is substantially less. In a bargaining unit of approximately 100 employees, one of two former stewards for the predecessor union provided the only viable evidence for Respondent to rely upon. However, this evidence falls far short of the evidence in *Allentown Mack.* Instead of assertions that the Union would lose the election, the statements Termath made indicate dissatisfaction only. Although statements of dissatisfaction with the quality of union representation are relevant, the evidence in this case, from only one source, taken as a whole, does not provide a genuine reasonable uncertainty regarding the Union's status.

Failure of employees to join the Union or execute dues checkoff authorizations[29] has traditionally been disregarded as a basis for a reasonable good faith doubt. The Board has reasoned that an employee may well desire continued representation by a union even though the employee does not belong to the union or pay union dues. In the final analysis, the issue has been viewed as "majority support" for union representation rather than financial support or union membership.[30] In order to support a "good faith" doubt of majority status, the Board has not traditionally allowed reliance upon a decline in union membership or in dues checkoff authorizations.[31] In the instant case, Respondent lost its Union bug in 1996 due to its failure to employ Union members in good standing. Assuming that pursuant to *Allentown Mack* the loss of the Union bug and Respondent's knowledge of failure of employees to join the Union or pay Union dues is relevant to a good faith doubt, I find that Respondent's evidence of such events is stale and unreliable.

At the time of withdrawal of recognition, Respondent's knowledge was 2 to 3 years old. I find, in agreement with counsel for the General Counsel, that Termath's statements in 1995 and loss of the Union bug in 1996 are an unreliable basis for withdrawal of recognition in 1998 due to their remoteness in time. Certainly, during this 2 to 3-year period of time, with an intervening merger of the Union, turnover of employees, and passage of time, Termath's sentiments regarding 1995 employee feelings toward the Union's predecessor are no longer probative of current employee sentiment toward the Union. Similarly, loss of the Union bug in 1996 does little to indicate whether at the time of withdrawal of recognition any unit employees were members in good standing of the Union.

In conclusion, Respondent's evidence is both quantitatively and temporally insufficient, I find that Respondent unlawfully withdrew recognition from the Union.

CONCLUSION OF LAW

By withdrawing recognition from the Union in August 1998, Respondent refused to bargain with the Union in violation of Section 8(a)(1) and (5) of the Act and has engaged in unfair

[27] See, e.g., *L & L Wine & Liquor Corp.*, 323 NLRB 848, 851 (1997); *Pennex Aluminum Corp.*, 288 NLRB 439, 441–442 (1988), enfd. 869 F.2d 590 (3d Cir. 1989).

[28] Even though McDonald did not corroborate Termath's testimony regarding postexecution statements, I credit Termath's testimony. Termath was a forthright witness whose testimony was tested extensively on cross-examination. Her demeanor indicated that she was certain of her facts. Accordingly, I credit her testimony.

[29] Facts and circumstances #8.

[30] See, e.g., *Manna Pro Partners*, 304 NLRB 782, 783 (1991), enfd 986 F.2d 1346 (10th Cir. 1993) (majority support refers to whether a majority of unit employees support union representation, and not to whether they are union members, quoting *Petoskey Geriatric Village*, 295 NLRB 800 at fn. 9 (1989)).

[31] See, e.g., *Furniture Rentors of America*, 311 NLRB 749, 755–756 (1993), enf. in relevant part, 36 F.3d 1240, 1244–1245 (3d Cir. 1994) ; cf., *NLRB v. Silver Spur Casino*, 623 F.2d 571, 580 (9th Cir. 1980), cert. denied 451 U.S. 906 (1981) (finding that evidence of lack of union membership was insufficient to rebut a presumption of continuing majority status but nevertheless noting that union membership, even in a right-to-work state, is some indication of union support, though it may be only marginally relevant).

labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Pursuant to *Caterair International*, 322 NLRB 64 (1996), Respondent must resume compliance with its preexisting bargaining obligation. *Caterair* requires restoration of the status quo ante. Accordingly, Respondent must recognize and bargain with the Union in order to remedy its unlawful withdrawal of recognition.

On these findings of fact and this conclusion of law and on the entire record, I issue the following recommended[32]

ORDER

The Respondent, McDonald Partners Inc. d/b/a Rodgers & McDonald Graphics, Carson, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with the Union as the exclusive bargaining representative of all of the employees in the unit described below by unlawfully withdrawing recognition from the Union.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with Communications Workers of America, Local 14904, Southern California Typographical and Mailer Union, AFL–CIO–CLC as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All employees as defined in Article 1 of the collective-bargaining agreement between Respondent and the Union, which was effective by its terms for the period June 1, 1995 through May 31, 1998.

(b) Within 14 days after service by the Region, post at its facility in Carson, California, copies of the attached notice marked "Appendix."[33] Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 5, 1998.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated: September 17, 1999

[32] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[33] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."